UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WILLIAM H. GARSIDE, JR.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil Docket No. 96-156-B-C***
	)	
BILL MARTIN CHEVROLET, INC., et al.,	***)***	
	)	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff, William H. Garside, Jr., brings this action against Bill Martin Chevrolet, Inc., Robert Burns Motors, Inc., Bob Chambers Ford, Inc., and Chambers Parts Distributors, Inc., alleging violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, through various acts in 1992 and 1993, including a failure by defendant Chambers Parts Distributors, Inc. to re-hire him in July 1993. The defendants move for summary judgment on all counts of the complaint. I recommend that the court grant the motion.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

of law." Fed. R. Civ. P. 65(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvardo-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. Factual Background

Viewed in the light most favorable to the plaintiff, the summary judgment record reveals the following facts: The plaintiff filed a charge of discrimination based on an injury against defendant Chambers Parts Distributors, Inc. with the Maine Human Rights Commission on January 4, 1994. Charge of Discrimination, Exh. A to Defendants' Statement of Material Facts (Docket No. 6) ("Defendants' Statement"), at 1. This charge was also filed with the federal Equal Employment Opportunity Commission ("EEOC") on February 18, 1994. *Id.* The charge alleges that, after the plaintiff was "released to return to work following surgery for a job-related injury," he asked his pre-injury employer to be allowed to return to work on July 6, 1993 and that he was not re-employed. *Id*. at 2. The charge alleges that the date of injury was September 23, 1991 and that the plaintiff had "continually sought work with [his] employer since the date of the original injury." *Id.* The parties

have stipulated that the plaintiff has exhausted his administrative remedies and that the plaintiff received a right-to-sue letter within 90 days prior to the date upon which he filed this action. *See* Report of Conference of Counsel (Docket No. 14).

After his injury, the plaintiff returned to work for Chambers Parts Distributors, Inc. from November 18 to November 29, 1991 four hours per day, but he was unable to perform his former duties as general manager. Affidavit of Ron Dunning, Exh. C to Defendants' Statement, ("Dunning Aff.") ¶ 7. During this time, he worked at a desk job, doing inventory control, purchasing, and telemarketing. *Id.* The plaintiff next returned to work on April 6, 1992, again performing light duty work four hours per day until early June 1992. *Id.* ¶ 8. The plaintiff worked briefly in August 1992 for Chambers Leasing, *id.*, which is not a defendant in this action. In early 1992 the president and treasurer of Chambers Parts Distributors, Inc., which then had "about nine" employees, decided to eliminate the position of general manager; the president had assumed most of the duties of the position when the plaintiff was out of work due to his injury. *Id.*; Affidavit of Robert M. Chambers, Exh. B to Defendants' Statement ("Chambers Aff."), ¶¶ 2, 4. The position did not exist again until June 1996 when the company expanded. Dunning Aff. ¶ 11; Chambers Aff. ¶ 6. Chambers Parts Distributors, Inc. had no other employment openings in 1993. Chambers Aff. ¶ 5.

While he was employed by Chambers Parts Distributors, Inc., the plaintiff "did work and saw other individuals doing work for" defendants Bill Martin Chevrolet, Inc., Robert Burns Motors, Inc. and Bob Chambers Ford, Inc. Affidavit of William H. Garside, Jr., attached to Plaintiff's Objection to Defendant's [sic] Motion for Summary Judgment (Docket No. 8), ¶ 1. The plaintiff did work for Chambers Leasing while, "on the books," he was still general manager for Chambers Parts Distributors, Inc. *Id.* Robert Chambers "was a principal in all these corporations and during this

period of time was involved in the day-to-day operation of them." *Id.*

The complaint alleges that it is brought pursuant to the Americans with Disabilities Act ("ADA") and Section 505 of the Rehabilitation Act of 1973, Complaint (Docket No. 1) ¶ 3, but the plaintiff has made it clear that he is not pursuing a claim under the Rehabilitation Act, Plaintiff's Memorandum of Law in Support of Objection to Defendant's [sic] Motion for Summary Judgment (Docket No. 8) at 1, 16. The complaint alleges that the ADA was violated when the plaintiff was "removed" from his position as general manager in June 1992; when in August 1992 the defendants refused to make available to him reasonable accommodations in connection with the vehicle shuttling job he had taken with Chambers Leasing; in September 1992 when Chambers Parts Distributors, Inc. refused to hire him for a service writer's position; in October 1992 when Chambers Leasing refused to accommodate an unspecified advertised position to the plaintiff's needs and abilities; and in July 1993 when Chambers Parts Distributors, Inc. refused to employ him again as general manager. Complaint ¶¶ 11, 14-16, 19-21.

II. Analysis

The defendants seek summary judgment on the 1992 claims on the grounds that they are barred by the applicable statute of limitations; on all claims against defendants other than Chambers Parts Distributors, Inc. on the grounds that no other defendant was named in the discrimination charge filed with the EEOC; and on the 1993 claim on the ground that there was no position available for the plaintiff at that time. The plaintiff, who does not dispute any statement contained in the Defendants' Statement of Material Facts, responds that the 1992 acts were part of a continuing pattern of discrimination that culminated in the 1993 act, for which a timely charge was made; that

the defendants "are so intertwined and interrelated that the general requirement that all be included in the EEOC Complaint should not be imposed," Plaintiff's Objection at [2]; and that defendant Chambers Parts Distributors, Inc. had an obligation under the ADA to accommodate his request for employment regardless of the availability of a position.

The parties agree that the failure of Chambers Parts Distributors, Inc. in July 1993 to hire the plaintiff as its general manager is the only act alleged under the ADA by the plaintiff that is timely on its face under the requirements of 42 U.S.C. § 2000e-5(e)(1), a statute of limitations that is applicable to ADA claims by virtue of 42 U.S.C. § 12117(a). Where a plaintiff has initially filed his charge with a state agency, as is the case here, the charge must be filed within 300 days after the alleged employment practice occurred. *EEOC v. Green*, 76 F.3d 19, 20-21 (1st Cir. 1996). The three hundreth day prior to February 18, 1994, the date upon which the plaintiff's charge was filed with the EEOC, was April 24, 1993. Assuming for purposes of the motion for summary judgment that the events cited by the plaintiff could form a continuing violation, the charge filed with the EEOC "may be timely as to all discriminatory acts encompassed by the violation so long as the charge is filed during the life of the violation or within the statutory period (e.g., 300 days) which commences upon the violation's termination." *Kassaye v. Bryant College*, 999 F.2d 603, 606 (1st Cir. 1993). If the failure to rehire the plaintiff in 1993 was not a violation of the ADA, the continuing violation, if any, ceased before April 24, 1993, and the current action is barred.

With regard to the 1993 incident, the plaintiff relies on an asserted theory of recovery under the ADA that is separate from the two traditional approaches of disparate treatment and disparate impact. *See, e.g., Smith v. City of Des Moines*, 99 F.3d 1466, 1469 (8th Cir. 1996). Relying solely on *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 305, 308-09 (5th Cir. 1981), a case decided

under the Rehabilitation Act before the ADA was enacted,[1] the plaintiff argues that the "surmountable barrier discrimination" theory of recovery makes the availability of a position for the plaintiff irrelevant. The logical outcome of this approach, not addressed directly by any party here, is that an employer[2] subject to the ADA must employ a disabled applicant in a position which can be reasonably accommodated to his needs regardless of whether the employer currently has such a position or the only such positions are currently filled. Nothing in *Prewitt* suggests such a requirement; there is no discussion in the reported opinion concerning the availability of the work for which the plaintiff applied.

In cases involving a claim by a job applicant[3] under the ADA, a plaintiff has been required to establish a prima facie case of discrimination by showing that: "1) he suffers from a disability; 2) there was a position available for which he was qualified; 3) the position was given to a person who was not disabled." *West v. Russell Corp.*, 868 F. Supp. 313, 317 (M. D. Ala. 1994); *Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996). This standard is often referred to as the "*McDonnell Douglas* model," after *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 (1973). The First Circuit has adopted the *McDonnell Douglas* model for use in ADA actions. *Jacques v. Clean-up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996). *Prewitt* is not inconsistent with the *West* formulation of this standard for unsuccessful employment applicants who bring ADA

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[1] Case law decided under the Rehabilitation Act provides guidance for interpretation of the ADA. *Katz v. City Metal Co.*, 87 F.3d 26, 31 n.4 (1st Cir. 1996).

[2] The defendants do not argue that any of them, or all of them if properly treated as a single employer, is not an employer within the definition of the ADA. 42 U.S.C. § 12111(5).

[3] Although the plaintiff had previously been employed by Chambers Parts Distributors, Inc., he is appropriately treated as an applicant in this case. *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 670-73 (1st Cir. 1995).

actions.

The fact that the First Circuit has not adopted the "surmountable barrier" approach set forth in *Prewitt* also counsels strongly against extending *Prewitt*'s reach in this court in the manner suggested by the plaintiff. The plaintiff's assertion that he need not show, as an element of a prima facie case, that there was a position available with the employer to whom he applied for which he was qualified, with or without accommodation, is simply incorrect. *White v. York Int'l Corp.*, 45 F.3d 357, 362 (10th Cir. 1995) (ADA does not require employer to create new position to accommodate disabled worker). Since he has made no attempt to make such a showing here, the defendants are entitled to summary judgment against him on the claim arising out of the 1993 failure to hire. Because the other claims raised by the plaintiff fall outside the time limits of 42 U.S.C. § 2000e-5(e)(1), they must fail as well.

III. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine, this 10th day of March, 1997.

David M. Cohen
United States Magistrate Judge